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No. 08-444

In the Supreme Court of the United States

JUAN M. CRUZADO-LAUREANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals may adopt a rule that resentencing on remand is presumptively limited, not presumptively de novo, when the court of appeals affirms a conviction and remands for correction of a discrete, specific sentencing error, but does not otherwise specify whether the remand is limited.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 527 F.3d 231. Two earlier opinions of the court of appeals (Pet. App. 18-62, 63-76) are reported at 404 F.3d 470 and 440 F.3d 44, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2008. On August 26, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including October 2, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the District of Puerto

Rico of one count of embezzling from a program receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A)(i) and (ii); five counts of extortion, in violation of 18 U.S.C. 1951(a); five counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (ii); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(1) and (2). He was sentenced to 63 months of imprisonment, to be followed by a three-year term of supervised release. He was also fined $10,000 and ordered to pay restitution in the amount of $14,251.82. The court of appeals affirmed the convictions but vacated the sentence and remanded for resentencing. Pet. App. 18-62. On remand, the district court imposed the same sentence. The court of appeals again vacated the sentence and remanded for resentencing. *Id.* at 63-76. On remand, the district court again imposed the same sentence. The court of appeals affirmed. *Id.* at 1-17.

1. In November 2000, petitioner was elected mayor of Vega Alta, a municipality in Puerto Rico. Pet. App. 20, 65. Almost immediately after taking office, petitioner began extorting and laundering money by, among other things, demanding kickbacks on municipal contracts and redirecting funds intended for the municipality into his own pocket. *Id.* at 21, 65. Petitioner would clear the extorted money through his own bank account, through a check-cashing business he had previously owned (but which had been taken over by his son when he became mayor), or through accounts at his wife's dental practice. *Id.* at 21-34, 65.

In 2001, the Federal Bureau of Investigation began investigating petitioner's conduct. Pet. App. 35, 65. During the investigation and after an initial indictment was handed down, petitioner attempted to tamper with three potential witnesses against him. *Ibid.*

2. a. A grand jury in the United States District Court for the District of Puerto Rico charged petitioner with one count of embezzling from a program receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(A)(i) and (ii); six counts of extortion, in violation of 18 U.S.C. 1951(a); six counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (ii); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(1) and (2). Pet. App. 35, 60-62, 66.

After a jury trial, petitioner was convicted of all counts against him except for one money-laundering count (on which the district court had granted a judgment of acquittal) and one extortion count (on which the jury returned a verdict of not guilty). Pet. App. 36.

In November 2002, the district court sentenced petitioner to 63 months of imprisonment, imposed a fine of $10,000, and ordered restitution in the amount of $14,251.82. Pet. App. 3, 36.

b. Petitioner appealed, challenging the sufficiency of the evidence supporting his convictions and arguing that his sentence was erroneously calculated. The court of appeals affirmed the convictions, Pet. App. 37-56, but it held that the district court plainly erred in sentencing petitioner under the 2000 edition of the Sentencing Guidelines instead of the 2002 edition, *id.* at 56-62. The court thus vacated the sentence and remanded for resentencing under the correct edition of the Guidelines. *Id.* at 58-62.

3. a. On remand, the district court performed the sentencing calculation anew under the 2002 edition of the Sentencing Guidelines. Pet. App. 66-69.

To establish the base offense level for a money-laundering offense, Section 2S1.1 of the Sentencing Guidelines uses the total offense level for the offense underly-

ing the money laundering. The district court thus started with a base offense level of ten (which is specified in Section 2C1.1(a) of the Guidelines as the base offense level for extortion under color of official right). Pet. App. 68. It then applied a two-level enhancement under Section 2C1.1(b)(1), because the offense involved more than one incident of extortion, and an eight-level enhancement under Section 2C1.1(b)(2)(B), because the extortion involved a payment for the purpose of influencing an elected decision-making official. *Ibid.* The final offense level under Section 2C1.1 was thus 20. Under Section 2S1.1(a), level 20 became the base offense level for calculating the advisory Guidelines range for money laundering. *Ibid.* The court then applied an additional two-level enhancement under Section 2S1.1(b)(2)(B) because the offense involved a conviction under the money-laundering statute, 18 U.S.C. 1956. Pet. App. 68.

The court then turned to the general-purpose adjustment provisions in Chapter Three of the Guidelines. Pet. App. 68. It applied a two-level enhancement for abuse of a position of public trust under Section 3B1.3, and another two-level enhancement for obstruction of justice under Section 3C1.1. *Id.* at 69. Petitioner's total offense level was 26, and with a criminal history category of I, the resulting advisory Guidelines range was 63 to 78 months. *Ibid.* The district court imposed the same 63-month sentence it had previously imposed. *Ibid.* It also imposed the same fine and ordered petitioner to pay the same amount in restitution. *Id.* at 3.

b. Petitioner appealed for a second time, challenging the district court's application of several provisions of the Guidelines. The court of appeals again vacated the sentence and remanded the case for resentencing. Pet.

App. 63-76. The court rejected petitioner's claims that the district court erred in giving him an eight-level enhancement under Section 2C1.1(b)(2)(B) and in applying the specific-offense-characteristics provisions of Section 2S1.1(b) after it had finished its Section 2C1.1 calculations. *Id.* at 70-73. The court, however, agreed with petitioner that the district court had erred in applying a two-level abuse-of-trust enhancement, because that enhancement is not available where any other provision that increases a sentence for holder of high public office already applies.[1] *Id.* at 73-76. That was the case here: the district court had applied Section 3B1.3 because petitioner had used the power of his high office in extorting and embezzling funds, and abuse of high office was the same concern that justified an eight-level enhancement under Section 2C1.1(b)(2)(B). *Id.* at 73-74.

In his appeal, petitioner also challenged the district court's order requiring payment of restitution and a fine and ordering supervised release. Pet. App. 70 n.7. The court of appeals, however, held that petitioner's arguments were "too perfunctory" to permit the court "to evaluate the merits of those aspects of his punishment." *Ibid.* (citing *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."), cert. denied, 494 U.S. 1082 (1990)).

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[1] Section 3B1.3 calls for an offense level increase "[i]f the defendant abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense." Sentencing Guidelines § 3B1.3. It states, however, that "[t]his adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic." *Ibid.*

The court of appeals again remanded the case for resentencing, stating that it was sending the case back to the district court because it had "determined that the court's interpretation of the Guidelines was legally erroneous." Pet. App. 76. The court also expressly noted that it did "not intend to intimate that the length of the sentence should necessarily be changed; what matters is that the premise as to the Guideline range must be correct." *Ibid.*

4. a. The resentencing hearing was held in April 2006. Pet. App. 77-117. Petitioner and the government agreed on the criminal history category (I) and the total base offense level (24), which resulted in an advisory Guidelines range of 51 to 63 months of imprisonment. *Id.* at 4, 80.

Petitioner argued at the hearing that the district court could reconsider all aspects of his sentence, including restitution, because the court of appeals had not explicitly limited the remand to a reassessment of the correct term of imprisonment without the abuse-of-trust enhancement. Pet. App. 88-90. He also sought to present witnesses to prove that he was "actually innocent," that he had been subject to malicious prosecution, and that there were no victims of his crime—and hence no need for restitution—because no loss had occurred. *Id.* at 82-87.

The district court determined that it could consider only the appropriate sentence within the corrected Guidelines range. Pet. App. 90-106; see *id.* at 4. The court stated that "[t]his sentencing hearing is for one specific purpose" and that "[t]here is a mandate by the Court of Appeals as to the two points that were improperly, according to the Court of Appeals, i[m]properly adjudicated to this defendant." *Id.* at 88. The court

added that petitioner challenged the restitution amount before the court of appeals and the court of appeals "did not enter that at all." *Id.* at 89. Thus, the court stated, "I don't think the issue of restitution is open at this stage of the proceedings." *Id.* at 90. The court agreed, however, to hear character testimony from four witnesses, and it allowed petitioner to submit the questions his counsel had planned to ask of those witnesses and the five additional witnesses he had wanted to call. *Id.* at 90-106; see *id.* at 4.

At the close of the hearing, the court reiterated that "[t]he fine was not the object of appeal or if it was the Court of Appeals did not touch it" and "[t]he restitution falls within the same category." Pet. App. 114. The court then applied the factors in 18 U.S.C. 3553(a) and again imposed a 63-month sentence and also re-imposed the same amount of restitution ($14,251.82) and the same fine ($10,000). Pet. App. 111-114; see *id.* at 4.

b. Petitioner appealed a third time, arguing, among other things, that the district court improperly limited the scope of the resentencing hearing to a decision on the appropriate term of imprisonment within the recalculated Guidelines range. The court of appeals rejected that claim, stating that, while "some circuits do generally allow de novo resentencing on remand," the First Circuit does not. Pet. App. 6; see *ibid.* (quoting *United States* v. *Ticchiarelli*, 171 F.3d 24, 32 (1st Cir.) ("[U]pon a resentencing occasioned by a remand, unless the court of appeals [has expressly directed otherwise], the district court may consider only such new arguments or new facts as are made newly relevant by the court of appeals' decision—whether by the reasoning or by the re-

sult.") (internal quotation marks omitted), cert. denied, 528 U.S. 850 (1999)).[2]

The court also rejected petitioner's assertion that even if a de novo resentencing was barred, the district court should have made new findings on the restitution and fine amounts because they are integral elements of every sentence and are thus within the exception carved out for matters "made newly relevant by the court of appeals' decision." *Ticchiarelli*, 171 F.3d at 32 (internal quotation marks and citation omitted). The court observed that petitioner contested restitution at his second sentencing hearing and had challenged both restitution and the fine in his prior appeal, but the court had "deemed those challenges waived because the claims were inadequately developed." Pet. App. 7. It explained that "[t]he need to correct the abuse-of-trust error" arising from its prior opinion had "not given new merit to his opposition to those assessments." *Ibid.* The court also concluded that petitioner's other arguments—that restitution was improper because no victim had a loss and that a fine was improper because he had no resources to pay it—were "unrelated to the abuse-of-trust issue and had no relationship to the issue" that had been before the district court on remand, which the court of appeals described as "the appropriate length of the sentence under the Guidelines." *Ibid.*[3]

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[2] Petitioner acknowledged that *Ticchiarelli* foreclosed his argument in the court of appeals, but stated that he was preserving the issue for review by this Court. Pet. App. 6-7.

[3] The court of appeals likewise disagreed with petitioner that, given the lower base offense level resulting from his second appeal, the district court should have considered imposing lower amounts of restitution and fine. Petitioner's counsel acknowledged at the sentencing hearing that the fine imposed ($10,000) was the lowest point of a range

The court of appeals thus held that the district court had properly limited the scope of the third sentencing hearing to a consideration of the appropriate sentence in light of the applicable advisory Guidelines range, and that the court of appeals' own review was also restricted to issues related to petitioner's term of imprisonment. Pet. App. 8.[4]

ARGUMENT

Petitioner renews (Pet. 8-24) his claim that the district court improperly declined to reconsider his entire sentence, including the amount of restitution ordered, where the case was remanded for resentencing because of a discrete, specific error in applying the Sentencing Guidelines. Petitioner points to a disagreement among the courts of appeals on whether resentencing after a remand is presumptively de novo or presumptively limited to correcting the errors found on appeal. Pet. 9-19. He urges the Court to grant certiorari and adopt the former rule. Pet. 19-24.

Review by this Court is not warranted. Because Congress has authorized the courts of appeals to limit a remand in a sentencing case as the court deems appropriate, and has authorized each court of appeals to adopt local rules of practice, there is no need for this Court to

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that went up to $500,000, and the restitution order was based on specific findings of loss rather than sentencing ranges under the Guidelines. Pet. App. 8.

[4] The court of appeals also rejected petitioner's claims that the district court had impermissibly double-counted his lack of acceptance of responsibility, that he should have been allowed to present victim testimony in mitigation of his punishment, and that bias on the part of the sentencing judge denied him due process, requiring resentencing before a different judge. Pet. App. 8-17. Petitioner has not renewed those claims in this Court.

adopt a uniform default rule to govern the scope of resentencing after remand when the court of appeals has not otherwise specified the extent of review on resentencing. Even if there did need to be a uniform default rule, this is not an appropriate case to establish one, because the result in petitioner's case would not be altered under the rule that he advocates. This Court has repeatedly declined to grant review in cases presenting the question raised by petitioner, and there is no reason for a different result here.[5]

a. Under 28 U.S.C. 2106, a court of appeals may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order" of the court whose decision it is reviewing, and may "remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." In addition, the statute governing sentencing appeals provides that, when a court of appeals finds a sentencing error, it must "remand the case for further sentencing proceedings *with such instructions as the court considers appropriate*." 18 U.S.C. 3742(f)(1), (2)(A) and (2)(B) (emphasis added). The statute also provides that, on remand, a district court shall resentence a defendant in accordance with 18 U.S.C. 3553 and with "such instructions as may have been given by the court of appeals." 18 U.S.C. 3742(g).

It is thus well settled that, after a court of appeals has reversed the judgment in a criminal case, it has au-

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[5] See, *e.g.*, *Tocco* v. *United States*, 539 U.S. 926 (2003) (No. 02-1225); *Donato* v. *United States*, 539 U.S. 902 (2003) (No. 02-1191); *Hass* v. *United States*, 531 U.S. 812 (2000) (No. 99-1694); *Harris* v. *United States*, 525 U.S. 1148 (1999) (No. 98-6358); *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372); *Whren* v. *United States*, 522 U.S. 1119 (1998) (No. 97-6220).

thority to provide either for de novo resentencing or for a limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 597-598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238 (8th Cir. 1997); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*, 56 F.3d 776, 777 (7th Cir. 1995); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995). It is also well settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-779; *Pimentel*, 34 F.3d at 800; *United States* v. *Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993). The courts of appeals are thus in agreement that they have discretion to determine the scope of a resentencing and that a district court is obligated to follow the directions of the court of appeals when conducting the resentencing. Although petitioner makes policy arguments (Pet. 19-24) on why resentencing should presumptively be de novo, he does not suggest that there is any constitutional or statutory right to de novo resentencing, and he does not question Congress's authority to allow a court of appeals to decide whether resentencing should be de novo or limited.

There is, however, disagreement among the courts of appeals on the narrow question of the proper scope of a resentencing when the court of appeals gives no indication as to the intended scope of proceedings on remand. Some courts of appeals have held that resentencing in such cases is limited to the correction of the errors found on appeal. See *United States* v. *Pineiro*, 470 F.3d

200, 205-207 (5th Cir. 2006); *United States* v. *Quintieri*, 306 F.3d 1217, 1227 (2d Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Ticchiarelli*, 171 F.3d at 32; *United States* v. *Marmolejo*, 139 F.3d 528, 530-531 (5th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Whren*, 111 F.3d 956, 960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996).[6] Other courts of appeals have held that resentencing in such cases is de novo. See *United States* v. *Faulks*, 201 F.3d 208, 210 (3d Cir. 2000); *United States* v. *Keifer*, 198 F.3d 798, 801 (10th Cir. 1999); *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151, amended, 96 F.3d 799 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995); *United States* v. *Cornelius*, 968 F.2d 703, 705 (8th Cir. 1992).

There is no need for this Court to adopt a uniform rule for all the courts of appeals, because the rules con-

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[6] Petitioner asserts (Pet. 10-12 & n.2) that the Second Circuit has adopted the rule that resentencing should be de novo. The Second Circuit, however, has held that no explicit authorization for de novo resentencing is required when one or more counts of conviction have been overturned on appeal, while explicit authorization for de novo resentencing is required when all convictions are affirmed but the court finds a "specific sentencing error." *United States* v. *Quintieri*, 306 F.3d 1217, 1227 (2002), cert. denied, 539 U.S. 902 (2003). Petitioner cites (Pet. 10 n.2) *United States* v. *Atehortva*, 69 F.3d 679, 685 (2d Cir. 1995), cert. denied, 517 U.S. 1249 (1996), but the Second Circuit has already explained that "*Atehortva*'s holding is properly limited to cases where one or more convictions have been vacated and we have remanded for resentencing on the remaining counts." *Quintieri*, 306 F.3d at 1227. See *id.* at 1228 ("absent explicit language in the mandate to the contrary, resentencing should be limited when the Court of Appeals upholds the underlying convictions but determines that a *sentence* has been erroneously imposed and remands to correct that error").

cerning resentencing on remand might appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement that there be "uniformity among the circuits in their approach to [these] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993).[7]

b. Even assuming there ought to be a uniform default rule governing resentencing when the court of appeals has otherwise failed to specify whether the remand is limited, this is not an appropriate case for the Court to establish such a default rule, because the Court's decision would not affect petitioner's sentence.

Petitioner contends that the presumption in the First Circuit is that resentencings are limited (Pet. 8); that the presumption was applied in this case (*ibid.*); and that the result would have been different if he had been sentenced in a number of other circuits (Pet. 19-21). Petitioner is correct on the first point, but mistaken on the second and third. It is true that the rule in the First Circuit is that resentencings are presumptively limited. See *Ticchiarelli*, 171 F.3d at 32. As explained below,

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[7] Two courts of appeals have suggested a connection between the court's rule concerning the scope of resentencing on remand and the provision of Fed. R. Crim. P. 32(i)(1)(D) that allows new claims to be raised at any time before the imposition of sentence "for good cause." See *United States* v. *McCoy*, 313 F.3d 561, 564-567 (D.C. Cir. 2002) (en banc); *United States* v. *Moore*, 83 F.3d 1231, 1235 (10th Cir. 1996). To the extent that a court of appeals considers its rule on the scope of resentencing to be compelled by the Federal Rules of Criminal Procedure, it could not properly be viewed as a local rule of practice.

however, the presumption was not necessary in this case. Instead, resentencing was specifically limited by the court of appeals. Because the remand was for a limited, rather than de novo, resentencing, the result here would have been the same in a circuit where resentencings are presumptively de novo.

In the second appeal in this case, the court of appeals remanded after stating that it had "determined that the court's interpretation of the Guidelines was legally erroneous." Pet. App. 76. The court added that the issue for resentencing on remand was "that the premise as to the Guideline range must be correct." *Ibid.* Thus, the court of appeals made clear that it was remanding for the limited purpose of correcting the specific Guidelines error (application of a two-level abuse-of-trust enhancement) and resentencing in light of the corrected advisory Guidelines range. That the court of appeals did not make that more explicit in its remand order does not defeat the inescapable conclusion that it remanded for correction of a discrete sentencing error. See, *e.g.*, *Quintieri*, 306 F.3d at 1227 ("to determine whether a remand is *de novo*, we must look to both the specific dictates of the remand order as well as the broader spirit of the mandate") (internal quotation marks and citation omitted); *ibid.* (where court of appeals opinion "identified a specific sentencing error, remanded because of that error, and decided that all other claims were without merit," the remand is not for de novo resentencing); *United States* v. *Genao-Sanchez*, 525 F.3d 67, 70 (1st Cir. 2008) ("In interpreting the mandate, the district court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.") (internal quotation marks and citation omitted); *Pineiro*, 470 F.3d

at 205 ("When on remand the district court assays to implement the mandate, it must proceed within the letter and spirit of the mandate by taking into account the appeals court's opinion and the circumstances it embraces.").[8]

The district court here acknowledged the limited scope of the mandate on remand (Pet. App. 88-90) and resentenced petitioner accordingly (*id.* at 111-114). Thus, because the court of appeals indicated that resentencing in this case was to be limited, the question that has divided the courts of appeals—what the default rule should be when the court of appeals does not specify whether resentencing should be de novo or limited— is not presented here and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Because district courts—even in circuits that apply the rule petitioner endorses—will always need to determine whether the mandate includes a limitation on the scope of resentencing, petitioner is mistaken in saying (Pet. 20-21) that, by changing the default rule, this Court could save district courts in "hundreds of cases each year" from having to "assess the extent of [their] power" on resentencing.